

**District of Columbia**  
**Office of the State Superintendent of Education**  
Office of Dispute Resolution  
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OSSE  
Office of Dispute Resolution  
November 21, 2014

<b>Student,<sup>1</sup></b>	)	<b>Room: 2003</b>
	)	
<b>Petitioner,</b>	)	<b>Date Issued: November 20, 2014</b>
	)	
<b>v.</b>	)	
	)	
<b>District of Columbia Public Schools,</b>	)	
	)	
	)	
<b>Respondent.</b>	)	<b>Hearing Officer: Michael Lazan</b>

**HEARING OFFICER DETERMINATION**

**I. Introduction**

This is a case involving a \_\_\_\_\_ student who is eligible for services as a student with Multiple Disabilities.

A Due Process Complaint (“Complaint”) was received by District of Columbia Public Schools (“DCPS” or “Respondent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on July 31, 2014 in regard to the Student. On August 8, 2014, Respondent filed a response. A resolution meeting was held on August 20, 2014. The resolution period expired on August 30, 2014.

**II. Subject Matter Jurisdiction**

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Improvement Act (“IDEIA”), 20 U.S.C. Sect. 1400 et seq., its implementing regulations, 34 C.F.R. Sect. 300 et seq., Title 38 of

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<sup>1</sup> Personally identifiable information is attached as Appendix A and must be removed prior to public distribution.

the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

### **III. Procedural History**

On September 3, 2014 and again on September 9, 2014, this Hearing Officer held a prehearing conference.

A prehearing conference order issued on September 12, 2014 summarizing the rules to be applied in this hearing and identifying the issues in the case. Petitioner moved to revise the prehearing conference order by motion dated September 17, 2014. There was no objection from Respondent. The order was therefore revised on September 24, 2014.

A hearing date followed on September 30, 2014. This was a closed proceeding.

Petitioner entered into evidence exhibits 1-25; Respondent entered into evidence exhibits 1-26. There were no objections filed in regard to the exhibits.

A motion to continue was filed by Petitioner on October 6, 2014 to accommodate the scheduling of witnesses. An Order of Continuance of thirty seven days was granted by Chief Hearing Officer Virginia Dietrich on October 9, 2014, extending the decision date to November 20, 2014. The previous decision date was October 14, 2014.

Additional hearing dates were held on November 10, 2014 and November 12, 2014. The parties presented closing statements orally on the record after completion of testimony.

Petitioner presented as witnesses: Petitioner; Witness A, DCPS Speech Language pathologist (expert: speech and language pathology) ; Witness B, DCPS transition coordinator (expert: special education planning and IEP development); Witness C, LEA representative School B (expert: special education); Clinical Psychologist A (expert: clinical psychology); Witness D, LEA representative (expert: special education); Social Worker A (expert: social work); Witness E, Head of School, School C. Respondent presented: Social Worker B, DCPS; Witness F, Psychologist (expert in school psychology with focus on the interpretation of psychological assessments with respect to special education).

#### **IV. Credibility**

I found all the witnesses credible in this proceeding. There were no material inconsistencies uncovered in connection to any witness, and all witnesses presented their testimony with reasonable candor. I found Clinical Psychologist A's testimony speculative in regard to the Student's progress at School B since Clinical Psychologist A had not observed the Student in school or reviewed documents relating to the school.

#### **V. Issues**

As identified in the Amended Prehearing Conference Summary and Order and in the Due Process Complaint, the issues to be determined are as follows:

1. Did DCPS provide the Student with an educational placement in 2013-2014 that was too large, did not have enough social and emotional supports, and did not provide the Student with a transition plan between schools?
2. Did DCPS deny the Student a FAPE by not amending the student's IEP in the new placement for 2013-2014?

3. Did the IEP dated April 29, 2014 fail to provide the Student with appropriate services in the areas of emotional support, executive functioning, writing, speech and language, transition planning, and activities of daily living, and fail to offer appropriate goals, sufficient research-based instruction, sufficient counseling or an extended school year program?

4. Did DCPS fail to write a necessary FBA and BIP for the Student?

5. Did DCPS decide to change the Student's placement with insufficient evaluative data?

As relief, Petitioner seeks compensatory education in the form of counseling, tutoring in reading math and written language, and speech and language therapy, and placement at School C.

#### **VI. Findings of Fact**

1. The Student is eligible for services as a student with Multiple Disabilities. (R-20-1)

2. The Student is distractible and impulsive, and has memory deficits and learning deficits. (P-11-2-7)

3. She has difficulty self-managing her behaviors, which impact on her relationships with adults and peers. She has difficulty displaying "pro-social" behaviors. (P-11-6)

4. Her distractibility can impact her performance in reading and comprehending more complex vocabulary. (R-8-6; R-20-8)

5. She has significant anxiety and depression issues. (Testimony of Social Worker A)

6. In school, the student has difficulty refraining from unrelated social interactions. (R-14-2-5)
  
8. She has significant deficits in receptive and expressive language. (P-11-5)
9. She has difficulty with complex vocabulary and advanced reading, and difficulty with graphs and understanding data entry. (R-14-2-5)
10. She is diagnosed with a mild intellectual disability, Attention Deficit Hyperactivity Disorder (ADHD), Predominantly Inattentive Type, and Unspecified Depressive Disorder. (P-25-11; Testimony of parent)
11. Her last formal testing resulted in a Full Scale IQ score of 66. (P-25-5)
12. She enjoys coming to school and learning “new things.” (R-22-2)
13. She benefits from teacher monitoring to keep her on task. She benefits from a highly structured environment, with concise, direct instructional tasks. She does well with visuals and positive reinforcement. (P-13-3)
14. The Student started at School A, a non-public school, for the 2008-2009 school year. (P-13-2)
15. School A offers large and small group instruction, individualized instruction in all areas, work on daily life skills, vocational activities, and community based activities. There are less than ten children in each class, and there are as many as four adults in the classroom at one time. There may be three teachers in a classroom. One teacher will be a special education teacher, and others would be assistant teachers. There is a team of social workers and behavior technicians always available to the

students to see them as needed. The Student was receiving individual counseling, paired counseling, a bimonthly social skills group, and counseling as needed with social worker at School A. (P-13-1; P-18-1; Testimony of Witness B)

16. At School A, if a social issue arose, the school would react quickly.

(Testimony of parent)

17. The school does a “great job” with individualized instruction. (Testimony of Witness B)

18. By all accounts, the Student performed well at School A. Her teachers were proud of her efforts in the classroom, and she received A and B grades on her report card. She mastered her math goals, she made progress on social and emotional issues, and she began to self-advocate more. She made “great” progress in speech with thirty minutes of therapy per week. She was considered on diploma track. (P-10-1-3)

19. For the 2011-2012 school year, the Student was still at School A, housed in a self-contained classroom. (P-10-1-3)

20. During this year, the student’s academic grades were mostly B and C grades with a F for one semester in Algebra. (P-17-1)

21. She also did well socially, and was looked up to by peers. Her behavior improved, though she still had behavioral issues. She was on “probation” one time for the 2011-2012 school year, but was on “probation” six times in the previous school year. (P-13-3-4)

22. The April 17, 2012 IEP team found the Student to be again eligible as a Student with Multiple Disabilities. (P-11-1)

23. At the time of the IEP, the Student was considered by the team to be on the sixth grade level in mathematics. She was on “Level M” in reading and was given passages for second and third grade in her assessment. (P-11-3)

24. She was recommended for 29 hours per week of specialized instruction outside of general education for the 2012-2013 school year, with 30 minutes per week of behavioral support services and thirty minutes per week of speech and language pathology. Classroom accommodations included small group and individual testing, repetition of directions, simplification of oral directions, flexible scheduling, and a location with minimal distractions. (P-11-8-10)

25. The Student did well again in 2012-2013. She made significant progress in her social emotional needs, and started to self-manage her behaviors. (R-14-7)

26. The Student still needed verbal cues, had difficulty refraining from unrelated social interactions, was distractible, had difficulty with complex vocabulary and advanced reading, and difficulty with graphs and understanding data entry. (R-14-2-5)

27. She also struggled with symptoms of depression and threatened to cut herself. On one occasion, she threatened suicide and a “risk assessment” was completed. She made sharp marks on her arms using her nails. She often requested additional counseling time with her social worker, with sessions on an as-needed basis. (P-18-1-2)

28. The School A counselor therefore recommended an increase in counseling from thirty minutes to ninety minutes per week. (P-18-2)

29. An IEP meeting was held on June 10, 2013 in regard to the Student. At the meeting, the Student’s special education hours were changed to 28.5 hours per week to accommodate a change to a public school. Behavioral support services were increased

to sixty minutes direct and thirty minutes consult. This is consistent with the recommendations of her counselor at School A. The Student agreed to the change in location -- though the parent and the School A staff did not agree. (R-13-2; R-17-1)

30. Though the IEP did not so state, the meeting minutes indicate that the Student was to receive behavior consult. This was communicated to DCPS staff at the time. (R-13-2; Testimony of Witness B)

31. The IEP's Post-Secondary Transition Plan focused on the Student's identification of school courses to prepare her to graduate, exploring training options for work , identifying and developing efficient student and note taking skills (two hours per week), locating and participating in volunteer activities (twenty five hours per year). "Transition services" are listed as participating in in-school work activities (sixty minutes per week), participating in activities where she can identify job requirements (one hour per week), and a summer employment program (twenty hours per week). Transition services relating to independent living are participating in social and community events (one hour per week), learning how to interpret transportation maps and schedules (one hour per week), and managing her finances (one hour per week). (R-14-13-17)

32. This IEP reported that the Student was on a ninth grade math level and was working on algebra. She was on the Level O in reading. Pragmatic language was considered a strength. Classroom accommodations included small group and individual testing, repetition of directions, simplification of oral directions, flexible scheduling, and a location with minimal distractions. (R-14-2-11)

33. A Prior Written Notice was sent to the Student on June 10, 2013 indicating that the District was going to change the location of services to an unspecified DCPS school. (R-15-1)

34. On July 12, 2013, the parent received a letter stating that the new location of services was School B. (R-16-1)

35. There are no more than ten students in the special education classrooms at School B. (Testimony of Witness B)

36. At School B, they use a reading program called Reading 180. (Testimony of Witness D)

37. The parent had trouble getting information from the school at the start of the school year. (Testimony of parent)

38. The Student generally likes the school  
(Testimony of Witness F)

39. Still, the Student was bullied at times during the school year. (Testimony of parent)

40. The parent was dissatisfied with the school's responsiveness in regard to bullying. (Testimony of parent)

41. The Student did not like her counselor. The girl who was bullying her was in her counseling group, which made counseling difficult for her. (Testimony of parent)

42. In part as a result, she missed group counseling frequently during the school year. (P-23-2-3; Testimony of parent)

43. On February 25, 2014, the Student expressed to Social Worker A that she had a plan to kill herself. (Testimony of Social Worker A)

45. The Student received individualized counseling after the incident.  
(Testimony of Social Worker B)

47. During the 2013-2014 school year, the Student had nightmares, felt sad and depressed, and was anxious. (P-23-1)

48. During the 2013-2014 school year, the Student's academic grades ranged from B+ to C.

49. In April, 2014, she was tested in the extremely low range of functioning, with a Full Scale I.Q. She has significant deficits in verbal comprehension, perceptual reasoning, and working memory. On the Woodcock-Johnson Tests of Achievement, Third Edition, broad math skills fell in the first percentile, broad reading was in the sixth percentile, and written language was in the third percentile. Her academic abilities were estimated to be on the fifth and sixth grade levels. (P-25-4-6)

50. A BASC-2 scale from her teacher showed no attentional issues, but elevations in terms of anxiety, depression, somatization, and internalizing problems. (P-25-10-11)

51. An IEP meeting was held on April 29, 2014. The parent expressed that School B was not the right placement for the Student. The Student was reported as appearing flat and depressed during therapy. It was reported that she had progressed “two years” in reading, putting her on the seventh grade level. (R-19-3)

52. The parent was also concerned about the Student’s boyfriend at School B. (Testimony of Witness D)

53. Services were changed outside of general education, with 240 minutes per month of behavioral support services, and speech and language pathology for ninety minutes per month. Classroom accommodations included small group and individual testing, repetition of directions, simplification of oral directions, flexible scheduling, and a location with minimal distractions. (R-20-9-11)

54. Speech was reduced because the Student had met her goals the previous year and the therapist felt that she could meet her goals in less time. The parent did not disagree with the reduction in speech. (Testimony of Witness A)

55. It was determined that she did not need a BIP. (R-19-3-4)

56. Math goals were changed from the prior IEP, as were reading goals, speech goals, and counseling goals. The adaptive/daily living skills goal was to maintain dialog with peers and adults, focusing on given tasks and refraining from non-related social sub conversations while performing given tasks. This was repeated from the

previous year's IEP. The entire section of the IEP relating to adaptive/daily living skills was repeated from the previous year's IEP. (R-14; R-20)

57. The Post-Secondary Transition Plan provided for college exploration (sixty minutes per year), "instruction from case manager" in regard to transition services for employment (120 minutes per year), and "instruction from case manager" in regard to transition services for independent living (60 minutes per year). (R-20-13-17)

58. Transition services were reduced because, according to DCPS, they did not want to remove her from the classroom as much. (Testimony of Witness A)

59. The Student continued at School B for the 2014-2015 school year. (Testimony of parent)

60. She has received individual and group counseling during the current school year. (Testimony of Social Worker B)

61. There is also a social skills group that meets with the Student. (Testimony of Social Worker B)

62. The Student has become reticent to go to school after an incident at the school a few days before the final hearing dates. (Testimony of parent)

63.

Class size at the school is eight to ten students for each teacher. Supplementary aids and services are provided, such as E-Books and word recognition software. There are behavior support services. There is vocational training, independent living skill training, on the spot counseling, individual counseling, and social skills training. Safety plans are written if the student is capable of harming themselves. Social groups are provided.

Classrooms tend to be clutter free and quiet, as there are no fidget tools. (Testimony of Witness E)

64. The Student is on target to graduate in 2015. (Testimony of Witness F)

## **VII. Conclusions of Law**

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

The burden of proof in a special education due process hearing lies with the party seeking relief. 5 DCMR 3030.3; Schaffer v. Weast, 546 U.S. 49 (2005).

The central purpose of the IDEA is to ensure that all children with disabilities have available to them special education and related services designed to meet their unique needs and provided in conformance with a written IEP (i.e., free and appropriate public education, or "FAPE"). 20 U.S.C. Sects. 1400(d)(1)(A), 1401(9)(D), 1414(d); 34 C.F.R. Sects. 300.17(d), 300.320; Shaffer v. Weast, 546 U.S. 49, 51 (2005).

Pursuant to the Supreme Court's decision in Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley, 458 U.S. 176, (1982), the IEP must, at a minimum, "provid[e] personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." Branham v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005).

### 1. 2013-2014 School Year Claims.

Petitioner contends that DCPS provided the Student with an educational placement in 2013-2014 that was too large, did not have enough social and emotional supports, and did not provide the Student with a transition plan between schools.

Petitioner also alleges that DCPS changed the Student's placement with insufficient evaluative data.

The primary tool for ensuring that the student is provided a FAPE is the child's IEP. Honig v. Doe, 484 U.S. 305, 311 (1988) ("[t]he primary vehicle" and "centerpiece" of the statute's education delivery system" is the IEP). Accordingly, IDEA claims are generally brought in connection to the IEP at issue in a case. The IEP provides parents and students with information in order to make an informed decision prior to making a placement decision. At the time that the parents and students must choose whether to accept the school district recommendation, they have only the IEP to rely on, and therefore the adequacy of the IEP itself creates considerable reliance interests for the parents and students. R.E. v. New York City Dept. of Educ., 694 F.3d 167, 186 (2d Cir. 2012)

The term "educational placement" refers to the type of educational program prescribed by the IEP. Educational placement refers to the general educational program, such as the classes, individualized attention, and additional services a child will receive, rather than the "bricks and mortar" of the specific school." T. Y. v. N.Y. Dept. of Educ., 584 F.3d 412, 419 (2d Cir. 2009).

Petitioner's contentions, in essence, focus on School B, the Student's location of services. Petitioner argues that this site that was too large, did not have enough social and emotional supports, and did not provide the Student with a transition plan between schools.

Courts hold that school districts may designate schools for students as long as the District assigns a school that may appropriately implement a Student's IEP. T.Y. v. New

York City Department of Educ., 584 F.3d 412 (2d Cir. 2009); cf. Savoy v. District of Columbia, 844 F. Supp.2d 23 (D.D.C. 2012)

There is nothing in the record to suggest that School B failed to materially implement the Student's IEP. On the contrary, the record suggests that the DCPS provided the Student with the required amount of specialized instruction and related services per the Student's IEP.

Moreover, there is nothing specific in the record to suggest that the size of the school itself, or the lack of a plan to manage the transfer from School A to School B, deprived the Student of any cognizable educational benefit. Nor does Petitioner present any legal support for placement-based claims relating to the size of the school or transitioning between schools.

In terms of behavioral supports, the record shows that the Student was provided with group counseling, and then with individual counseling. When the Student had conflicts with her first counselor, she was assigned a second counselor who provided her with individualized counseling. The record also shows that the Student did receive "at-risk" counseling during the school year through a thirty minute behavior consult. While this consult was not listed on the IEP, there is testimony that DCPS service providers were advised of this requirement.

Petitioner pointed out that there were two serious behavioral incidents during this school year, and there is testimony and evidence that the Student was depressed at times throughout the year. Still, there is insufficient evidence in the record that the Student's behavioral problems consistently impacted her in the classroom. In this connection, Petitioner suggests that the Student did not progress during the school year. However,

Clinical Psychologist A reported that the Student has made good progress since 2010, when she was on the third grade level. Clinical Psychologist A testified that this progress was solely due to the Student's work at School A, but this assertion was not in her report. Clinical Psychologist A did not observe the Student at School B and did not review records from School B in connection to her assessment.

Under the circumstances, Petitioner has not shown that the placement at School B, by itself, was inappropriate.

I will note that there is no duty for the District to conduct evaluations of the Student in connection to the Student's placement. This duty is imposed on the District prior to the IEP meeting, not the placement decision.<sup>2</sup> Nevertheless, I have considered

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<sup>2</sup> An LEA is required to use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining (i) whether the child is a child with a disability; and (ii) the content of the child's individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum, or, for preschool children, to participate in appropriate activities. The LEA should not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child, and use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. 28 U.S.C. Sect.1414(b)(2); 34 C.F.R. Sect.300.304(b).

The LEA must also ensure that the assessment and evaluation materials that are utilized to assess the child are selected and administered so as not to be discriminatory on a racial or cultural basis; are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer; are used for purposes for which the assessments or measures are valid and reliable; are administered by trained and knowledgeable personnel; and are administered in accordance with any instructions provided by the producer of such assessments. The LEA is further required to ensure that the child is assessed in all areas of suspected disability and that the chosen assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided. 28 U.S.C. Sect.1414(b)(3); 34 C.F.R. Sect.300.304(c).

Petitioner's contention that the decisions of Respondent here were based on insufficient data. In this connection, an IDEA claim is viable only if violations of procedural deadlines affected the student's substantive rights. Lesesne ex rel. B.F. v. District of Columbia, 447 F.3d 828, 834 (D.C.Cir.2006); Smith v. District of Columbia, 2010 WL 4861757 (D.D.C. 2010); Holdzclaw v. District of Columbia, 524 F.Supp.2d 43, 48 (D.D.C.2007); Kruvant v. District of Columbia, 99 Fed. Appx. 232, 233 (D.C.Cir.2004).

Petitioner contends that the Respondent did not conduct formal testing prior to the change in location. However, Petitioner does not specifically explain what formalized testing would add to the educational program. The record shows that Respondent conducted a reasonably thorough review for the Student. In particular, representatives of the non-public school were at the review to state the Student's academic and behavioral characteristics. I find that the District had enough information before it prior to the IEP meeting of June 10, 2013.

Finally, Petitioner contends that a new IEP should have been written because of the change in location of services during the 2013-2014 school year.

Districts do have a duty to revise IEPs as appropriate. Kevin T. v. Elmhurst Comm. Sch. Dist. No. 205, 36 IDELR 153 (N.D. Ill. 2002) However, the IEP that was created on June 10, 2013 was written in anticipation of the Student's placement at a DCPS public school. The Student's counseling was increased from the previous IEP from April 17, 2012 from thirty minutes per week to sixty minutes per week of counseling. Thirty minutes of behavioral consultation services were also provided to the Student per the IEP meeting minutes. The hours of specialized instruction were

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adjusted to sync the IEP to public school hours. The IEP goals were all changed from the 2012-2013 IEP. I find that there was no duty to revise this IEP solely because of the transfer to the public school.

In sum, I find Petitioner's placement claims to be without merit.

2. Functional Behavior Assessment/Behavior Intervention Plan.

Courts in the District of Columbia have held that it is "essential" for the LEA to develop a Functional Behavior Assessment (FBA). The FBA's role is to determine the cause, or "function," of the behaviors and then the consequences of that behavior. Harris v. Dist. of Columbia, 561 F. Supp. 2d 63, 68 (D.D.C. 2008); see also Long v. Dist. of Columbia, 780 F. Supp.2d 49 (D.D.C. 2008)(in ruling the District failed to provide an FBA/BIP for a Student, court stated that "the quality of a student's education is inextricably linked to the student's behavior"); Shelton v. Maya Angelou Charter School, 578 F.Supp.2d 83 (D.D.C. 2008)(FBA/BIP required where learning disabled student was suspended) . The FBA should focus on the antecedents to the behaviors, on the theory that a change in the antecedents can lead to a change in the behaviors. C.F. ex rel. R.F. v. New York City Dep't of Educ., 2011 WL 5130101 at \*9 (S.D.N.Y. 2011); R.K. ex rel. R.K. v. New York City Dep't of Educ., 2011 WL 1131492 at \*19 (S.D.N.Y. 2011). The information gleaned from the assessment is central to formulating an IEP tailored to the needs of individual disabled children. Harris, 561 F.Supp. 2d\_at 68.

In addition to an FBA, if the behavior of a student impedes the student's learning, the IEP team shall consider the use of positive behavioral supports and other strategies to address that behavior in conformance with the IDEA and its implementing regulations. 20 U.S.C. Sect. 1414(d)(3)(B)(i); 34 C.F.R. Sect. 300.324(a)(2)(i). According to DCMR

Sect. 5-3007.3, an individual behavior plan (Behavior Intervention Plan, or BIP) shall be developed and incorporated into the IEP. A copy of that individual behavior plan shall be provided to the child's parents or the student and to each teacher and service provider.

The record indicates that the Student did have issues in the school setting, especially attending to task. The record also indicates that the Student was depressed during the year. However, I cannot find, on this record, that these issues rise to the level of requiring an FBA and, then, a BIP. The record suggests that counseling provided to the Student was a sufficient intervention, much as counseling was a sufficient intervention at School A.

Petitioner points to the two major behavioral incidents from February, 2013 and March, 2013. These incidents were certainly serious, but no pattern of such incidents has been established in the record. Moreover, the record indicates that the Student had similar behavioral problems at School A. I will point out that the record does not include an FBA or BIP from School A. On this record, I cannot find that the Student required an FBA or BIP at School B.

3. April 29, 2014 IEP claims.

Petitioner contends that the IEP dated April 29, 2014 failed to provide the Student with appropriate services in the areas of emotional support, executive functioning, writing, speech and language, transition planning, and activities of daily living. Petitioner also contends that the IEP failed to offer appropriate goals, sufficient research-based instruction, sufficient counseling or an extended school year program.

The appropriateness of an IEP is determined by considering two issues: first, whether the school district complied with the IDEA's procedural requirements and,

second, whether the IEP was “reasonably calculated to enable the child to receive educational benefits.” Rowley, 456 U.S. at 206-207.

In S.S. ex rel. Shank v. Howard Road Academy, 585 F. Supp.2d 56, 66-67 (D.D.C. 2008), the Court found that the measure and adequacy of an IEP decision must be determined as of the time it was offered to the student. Citing to Circuit court decisions, the Court found that an IEP should be judged prospectively to avoid “Monday morning quarterbacking.” See Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1149 (10<sup>th</sup> Cir. 2008); Adams v. Oregon, 195 F.3d 1141, 1149 (9<sup>th</sup> Cir. 1999); Carlisle Area Sch. V. Scott P., 62 F.3d 520, 530 (3d Cir. 1995); Roland M. v. Concord Sch. Comm., 910 F.2d 983, 992 (1<sup>st</sup> Cir. 1990).

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies: (i) Impeded the child's right to a FAPE; (ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) Caused a deprivation of educational benefit. 34 CFR Sect. 300.513(a).

In regard to emotional supports and counseling, the record is clear that the Student requires “at-risk” counseling services, which can be defined as counseling when the Student might be in sudden need. This need was established through documents and testimony from School A, and more or less confirmed by testimony from Witness B from DCPS. Witness B indicated that the Student did receive such counseling services for the 2013-2014 school year through a “consult.” For the 2014-2015 school year, however, a behavioral consult of this sort was not mentioned in the IEP or in the IEP minutes. The IEP should contain all services that are to be provided to the Student. I find that the

emotional supports in the IEP are not reasonably calculated because there is no provision for “at-risk” counseling.

In terms of issues relating to executive functioning, there is insufficient testimony and documentation in the record to establish that the Student has executive functioning issues that impact her in the classroom. Clinical Psychologist A’s report mentions executive functioning issues in passing, but the report does not specifically recommend any interventions specifically designed to address these issues.

Regarding writing, the IEP does not contain any goals relating to writing and does not mention writing as an area of concern. There is no discussion of the Student’s writing needs at all. Clinical Psychologist A reported that the Student’s broad written language scores were only in the third percentile. She reported that the Student’s writing was at the 3.2 grade level, that the story she wrote for her was very basic, and that the story had several grammar and spelling errors. I deduce that the Student’s teachers knew this Student needed specialized instruction in writing at the time the IEP was formulated. I agree that the IEP was not reasonably calculated since it failed to identify the Student’s writing needs or to provide the Student with any writing goals.<sup>3</sup>

In terms of speech and language pathology, Petitioner called a therapist from DCPS to testify. This witness explained why the Student’s services had been reduced from 120 minutes to 90 minutes. The therapist stated that speech was reduced because the Student had met her goals the previous year and the therapist felt that she could meet

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<sup>3</sup> This issue was not raised in connection to the 2013-2014 school year. As a result, there was no analysis of the Student’s writing needs in my discussion of FAPE claims relating to the 2013-2014 school year.

her goals in less time. The parent did not disagree with the reduction in speech. There was no other witness called on this issue. This contention is without merit.

In regard to transition planning, these services are defined as “a coordinated set of activities for a child with a disability” that is a “results oriented process” that is “based on the individual child’s needs.” 34 C.F.R. Sect. 300.43. The focus of transition services is to “improve the academic and functional achievement of a child with a disability, to facilitate the child’s movement from school to post-school activities.” Id. Services must be “based on an individual child’s needs, taking into account the child’s strengths, preferences and interests” and includes instruction, related services, community experiences, employment and other post-school adult living objectives, and “if appropriate” acquisition of daily living skills and provision of a functional vocational evaluation. Id.; see also 71 Fed. Reg. 46579 (2006)(definition of transition services is written broadly).

As stated by a federal court:

Congress in the IDEA placed "added emphasis on transition services so that special education students leave the system ready to be full productive citizens, whether they choose to go on to college or a job." 150 Cong. Rec. S11653-01, S11656 (Nov. 19, 2004) (Conf. Rep. accompanying H.R. 1350) (Statement of Sen. Dodd). Among its many changes, the IDEIA is supposed to "enhance[ ] planning and transition services for children with disabilities," id. at S11655 (statement of Sen. Reed), and "significantly improve[ ] transition services to ensure that students with disabilities are prepared for postsecondary education or employment." Id. at S11659 (statement of Sen. Bingaman).

Carrie I. v. Department of Educ., 869 F. Supp.2d 1225 (D. Haw. 2012)(while noting that a violation of transition services rules is a procedural violation, where a transition services plan was “essentially nonexistent,” FAPE denial resulted)

The transition plan in the IEP is vague and not individualized. In regard to transition services for employment and transition services for independent living, the plan calls only for “instruction from case manager.” In terms of transition services for post-secondary education and training, the IEP recommends only sixty minutes of “college exploration” for the entire year. Moreover, there is a reduction in services from the more specific IEP for the 2013-2014 school year, which provided , among other things, exploring training options for work in the veterinary field (thirty minutes per week), identifying and developing efficient student and note taking skills (two hours per week), and locating and participating in volunteer activities (twenty five hours per year). None of these kinds of activities were provided for in the transition plan for the current school year.

DCPS’s argument is that they did not want to pull the Student out of classes, but I find this argument lacking in credibility. The individualized transition plan that was created for the prior school year only took up a modest amount of the student’s time. Transition planning is particularly important for the Student this year, since she is scheduled to graduate in June, 2014. I find that DCPS’s transition plan was not reasonably calculated in the April 29, 2014 IEP.

The entire adaptive/daily living skills section of the 2014-2015 IEP is identical to the section in the 2013-2014 IEP. While goals may be repeated if the Student has not mastered the goal and the goal is appropriate, it is not reasonable to “cut and paste” whole sections of an old IEP and place those sections on a new IEP. I agree that the IEP does not appropriately provide for adaptive/daily living skills.

In regard to Petitioner's claim that the IEP goals were invalid, Petitioner contends that the goals do not contain appropriate baselines. However, many of the IEP goals do contain baselines. For instance, IEP Reading Annual Goal 1, relating to inferences, indicates that the Student is currently reading at the 5<sup>th</sup> grade level according to a recent test. Moreover, there is no requirement that IEP goals have baselines. The requirement is only that they are measurable and specific. See, e.g., Susquenita Sch. Dist. v. Raelle S., 25 IDELR 120 (M.D. Pa. 1996). A review of the IEP shows that the goals do appear measurable and specific. Moreover, Petitioner has not shown how these goals have compromised her education. I find that the adaptive living skills goal on the IEP is defective because it was thoughtlessly repeated from the prior IEP, but that claims relating to the appropriateness of the remainder of the goals on this IEP are without merit.

In regard to research-based instruction, Petitioner has provided no authority to support the position that an IEP must specifically designate which instruction is research-based. In closing argument, Petitioner argues that it is unclear whether the Student received research-based instruction. However, Petitioner bears the burden of persuasion. A lack of clarity in the record does not form the basis of a claim. Petitioner's obligation is to prove her claim by a preponderance of the evidence. This claim is without merit.

Finally, in terms of an extended school year (ESY) program, ESY Services are only necessary to a FAPE when the benefits a disabled child gains during a regular school year will be significantly jeopardized if s/he is not provided with an educational program during the summer months. Shank, 585 F.Supp.2d at 68-69; see also Johnson v. D.C., 873 F. Supp. 2d 382, 386 (D.D.C. 2012) There is no evidence or testimony that the Student's gains would be significantly jeopardized if she did not attend school over

the summer. There was no testimony offered about any regression during the summer, and there is no documentation supporting this claim, which is without merit.

In sum, I find that the April 29, 2014 IEP was not reasonably calculated and denied the Student a FAPE by the cumulative impact of failing to identify issues and provide goals in the area of writing, failing to provide at-risk counseling support, failing to provide an individualized and detailed transition plan, and failing to identifying issues and goals in the area of adaptive living skills.<sup>4</sup>

### **VIII. Relief**

As a remedy, Petitioner asserts that appropriate relief in this matter is to order placement at School C and compensatory education.

When school districts deny Students a FAPE, courts have wide discretion to insure that students receive a FAPE going forward. As the Supreme Court stated:

The statute directs the court to “grant such relief as [it] determines is appropriate.” The ordinary meaning of these words confer broad discretion on the court. The type of relief is not further specified, except that it must be “appropriate.” Absent other reference, the only possible interpretation is that the relief is to be “appropriate” in light of the purpose of the Act. As already noted, this is principally to provide handicapped children with “a free appropriate public education which emphasizes special education and related services designed to meet their unique needs.

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<sup>4</sup> Good grades, while an indicator of an appropriate IEP, do not necessary lead to a conclusion that FAPE has been offered – particularly in a self-contained classroom. D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 568 (3d Cir. 2010)(“overall, we think that it is clear that a court should not place conclusive significance on special education classroom scores, a conclusion that we believe is reinforced by the circumstance that, as here, there may be a disconnect between a school’s assessment of a student in a special education setting and his achievements in that setting”).

School Committee of the Town of Burlington v. Dep't of Education, Massachusetts, 471 U.S. 359, 371 (1985).

In Branham v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005), the Circuit laid forth rules for determining when it is appropriate for IHOs to order funding of non-public placements. First, the court indicated that “(i)f no suitable public school is available, the [school system] must pay the costs of sending the child to an appropriate private school.” Id. At 9 (citing Jenkins v. Squillacote, 935 F.2d 303, 305 (D.C.Cir.1991)). The Circuit then explained that such relief “must be tailored” to meet a student’s “unique needs.” Id. At 11-12 (citing to Florence County School Dist. v. Carter, 510 U.S. 7, 16 (1993)). To inform this individualized assessment, courts must consider “all relevant factors” including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the private school, the placement's cost, and the extent to which the placement represents the least restrictive educational environment. Id. at 12.

The record indicates that School C would provide the Student with many of the interventions that she requires, including small class size, extensive behavioral supports, and vocational training. However, the Student is now in the middle of her final year of high school, and DCPS points out that it would be inappropriate to force this Student to transfer in the middle of the school year. I find this argument to be compelling, especially given that School B can be an appropriate placement for this Student if modifications are made to the Student’s IEP. N.T. v. District of Columbia, 839 F.Supp.2d 29, 34 (D.D.C. 2012)(ordering an IEP to be modified rather than ordering a private school).

The record suggests that the Student is benefitting from many of the interventions at School B, including small class instruction and related services of speech and language therapy and counseling. She is on course to graduate at the end of the school year. Moreover, School B is a setting which provides an education to the Student in her Least Restrictive Environment (LRE). School B is a public school which houses typically developing peers and the record suggest that the Student has in fact interacted with typically developing peers at School B. School C does not contain typically developing peers. While LRE does not have to be the deciding factor in determining whether to order that a student be placed in a non-public school, in this fact pattern, where the Student has had some success at the school and has expressed an interest in graduating, I find it inappropriate to order that the Student be placed at School C. I will note that the Student did not testify in this proceeding.

Petitioner also seeks compensatory education for the period of FAPE denial. One of the equitable remedies available to a hearing officer, exercising his authority to grant "appropriate" relief under IDEA, is compensatory education. Under the theory of compensatory education, courts and hearing officers may award "educational services to be provided prospectively to compensate for a past deficient program." Reid v. District of Columbia, 401 F.3d 516, 521-23 (D.C. Cir. 2005). In every case, however, the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. Id., 401 F. 3d at 524; see also Friendship Edison Public Charter School v. Nesbitt, 532 F. Supp. 2d 121, 125 (D.D.C. 2008) (compensatory award must be based on a "qualitative,

fact-intensive' inquiry used to craft an award 'tailored to the unique needs of the disabled student").

A Petitioner need not "have a perfect case" to be entitled to a compensatory education award." Stanton v. District of Columbia, 680 F. Supp. 201 (D.D.C. 2011) Under the IDEA, if a Student is denied a FAPE, a hearing officer may not "simply refuse" to grant one. Henry v. District of Columbia, 55 IDELR 187 (D.D.C. 2010) Some students may require only short, intensive compensatory programs targeted at specific problems or deficiencies. Reid, 401 F.3d at 524.

Petitioner seeks compensatory counseling, tutoring in reading math and written language, and speech and language therapy. However, no compensatory education plan was presented in this case. Moreover, Clinical Psychologist A's approach to compensatory education was merely to provide the Student with hour for hour compensation without heed to the Reid factors. Under the circumstances, I find that it is incumbent upon me as a Hearing Officer to fashion a compensatory education remedy.

Taking into consideration the failure of the DCPS to provide adequate writing services and counseling services, I will order that DCPS provide the Student with forty hours of individualized tutoring in writing by a certified special education teacher and forty hours of counseling by a licensed social worker. There was no FAPE denial in connection to reading, math or speech and language therapy. Accordingly, it is not appropriate to provide compensatory education in these areas.

### **IX. Order**

As a result of the foregoing, I hereby order the following:

1. The IEP team shall convene within twenty days of the issuance of this HOD to rewrite the IEP by:
  - a. Including a section relating to the Student's writing needs and goals;
  - b. Including a current and complete section relating to the Student's Adaptive/Daily Living Skills;
  - c. Including a current and complete section relating to the Student's transition needs;
  - d. Adding specific language to the IEP requiring the Student to receive immediate "at-risk" counseling if she reasonably requests it during the school day, or if she engages in inappropriate conduct that impacts on her academics during the school day.
2. The Student is hereby awarded forty hours of 1:1 instruction in writing, by a certified special education teacher;
3. The Student is hereby awarded forty hours of 1:1 counseling by a licensed social worker;
4. Petitioner's other claims are hereby denied.

Dated: November 20, 2014

Michael Lazan  
Impartial Hearing Officer

## **X. Notice of Appeal Rights**

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 USC §1415(i).

Date: November 20, 2014

*Michael Lazan*  
Impartial Hearing Officer